

Robert A. Van Nest, SBN 84065, rav@kvn.com
Stuart L. Gasner, SBN 164675, slg@kvn.com
David J. Silbert, SBN 173128, djs@kvn.com
Keker & Van Nest, LLP
710 Sansome Street
San Francisco, CA 94111-1704
Telephone: (415) 391-5400
Facsimile: (415) 397-7188

Todd G. Miller, SBN 163200, miller@fr.com
Fish & Richardson P.C.
12390 El Camino Real
San Diego, CA 92130
Telephone: (858) 678-5070
Facsimile: (858) 678-5099

Mathias W. Samuel, pro hac vice, samuel@fr.com
Fish & Richardson P.C., P.A.
60 South Sixth Street, Suite 3300
Minneapolis, MN 55402
Telephone: (612) 335-5070
Facsimile: (612) 288-9696

Attorneys for Plaintiffs/Counterclaim Defendants
Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

FRESENIUS MEDICAL CARE HOLDINGS,
INC., a New York corporation; and FRESENIUS
USA, INC., a Massachusetts corporation,

Plaintiffs and Counterdefendants,

v.

BAXTER INTERNATIONAL, INC., a
Delaware corporation; and BAXTER
HEALTHCARE CORPORATION, a
Delaware corporation,

Defendants and Counterclaimants.

Case No. C 03-01431 SBA (EDL)

**DECLARATION OF THOMAS S.
MCCLLENAHAN IN SUPPORT OF
FRESENIUS' OPPOSITION TO BAXTER
DEFENDANTS' MOTION TO BAR
FRESENIUS' PROFFERED DAMAGES
EXPERT PROFESSOR RUBINFELD**

1 I, Thomas S. McClenahan, hereby state and declare as follows:

2 1. I am an attorney in the law firm of Fish & Richardson P.C., P.A., counsel of record
3 for Fresenius Medical Care Holdings, Inc. and Fresenius USA, Inc. (collectively, "Fresenius") in
4 the above entitled action.

5 2. I make this declaration in support of Fresenius' Opposition to Baxter's Motion to
6 Bar Fresenius' Proffered Damages Expert Professor Rubinfeld.

7 3. Attached to this declaration as **Exhibit A** is a true and correct copy of a December
8 1, 1998 letter to William Grieco from James Geringer.

9 4. Attached to this declaration as **Exhibit B** is a true and correct copy of *Calculating*
10 *Intellectual Property Damages* (AICPA 2006).

11 5. Attached to this declaration as **Exhibit C** is a true and correct copy of Patent
12 Damages and Practice § 3:7, Reasonable Royalty Damages.

13
14 I declare under penalty of perjury that the foregoing is true and correct.
15
16

17 Dated: March 21, 2006

s/ Thomas S. McClenahan
Thomas S. McClenahan

18
19
20
21 60346953.doc
22
23
24
25
26
27
28